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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. DERRICK HILL, Defendant and Appellant.	B288544 (Los Angeles County Super. Ct. No. YA095474)

APPEAL from a judgment of the Superior Court of Los Angeles County, Alan B. Honeycutt, Judge. Affirmed.

Steven A. Brody, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Zee Rodriguez, Supervising Deputy Attorney General and Stephanie C. Santoro, Deputy Attorney General for Plaintiff and Respondent.

INTRODUCTION

Derrick Hill appeals from the judgment entered after a jury convicted him of inflicting corporal injury on a spouse, aggravated mayhem, and torture, for which the trial court sentenced him to life in prison with the possibility of parole, plus one year. Hill argues that there was insufficient evidence he acted with the requisite intent for aggravated mayhem and that the trial court erred in admitting some of the evidence of a prior act of domestic violence. Hill also argues the court erred in failing to instruct the jury on battery with serious bodily injury and simple battery as lesser included offenses of torture and aggravated mayhem. We affirm.

FACTUAL AND PROCEDURAL HISTORY

A. *Hill Sets His Wife on Fire*

On December 14, 2016 Ebony Hill called 911 to report that her husband "put a flame" on her and set her on fire. She said Hill poured rubbing alcohol on her and threw a flame at her while she was sitting in a chair. Ebony reported that she had burns on her neck, back, and head and that her hair was burned.

When Deputy Mayra Haro arrived at the apartment, paramedics were treating Ebony, and Hill had left. Ebony was crying, flailing her arms around, and making "hissing sounds with her mouth," and she "looked like she was in pain." Deputy Haro observed that Ebony's skin was blistering above her ear and on her shoulder and that her shirt "was wet around the collar area." Ebony told Deputy Haro she had an argument with Hill, and he set her on fire by throwing rubbing alcohol and a lighter at her. Deputy Haro smelled alcohol and burnt hair but did not

find rubbing alcohol or a lighter in the apartment. The jury saw a photograph of the paramedics treating Ebony on the couch.

The paramedics took Ebony on a gurney, and she was later transferred to a hospital burn unit. She was treated for second degree burns to her upper back, neck, earlobes, right cheek, and upper right abdomen. Ebony's treating physician at the hospital burn unit described Emily's injuries as "quite painful." She had "deep partial thickness injuries" on her upper back. On January 10, 2017 police went back to the apartment and arrested Hill.

The People charged Hill with attempted willful, deliberate, and premeditated murder (Pen. Code, §§ 187, subd. (a), 664),[1] inflicting corporal injury on a spouse (§ 273.5, subd. (a)), assault with a deadly weapon (§ 245, subd. (a)(1)), assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(4)), possession of a firearm by a felon (§ 29800, subd. (a)(1)), aggravated mayhem (§ 205), and torture (§ 206). The People alleged Hill personally inflicted great bodily injury under circumstances involving domestic violence (§ 12022.7, subd. (e)) and personally used a deadly or dangerous weapon (alcohol and fire) (§ 12022, subd. (b)(1)). The People also alleged Hill had served a separate prison term for a felony within the meaning of section 667.5, subdivision (b).

B. *The People Introduce Evidence of a Prior Act of Domestic Violence by Hill*

At trial the prosecution introduced evidence of Hill's prior act of domestic violence in 2009 against Ashley Hassan. In that incident police responded to a 911 call regarding an unresponsive person and arrived to find Hill kneeling over Hassan and

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[1] Undesignated statutory references are to the Penal Code.

performing CPR. Hassan was taken to the hospital, but she did not survive.

When investigators initially questioned Hill, Hill said he was smoking marijuana with his friends outside his apartment and saw Hassan on the floor inside the apartment. She had urinated on herself, and he asked her if she was okay. When she nodded yes, Hill went back outside to finish smoking marijuana. When he returned minutes later, Hassan was unresponsive. He called 911.

Hill, however, changed his story about the 2009 incident "several times." He ultimately admitted he fought with Hassan because she had spilled milk on his shirt. After Hassan locked him out of the apartment and hit him several times with an umbrella, Hill punched her, and she fell to the floor. When Hill asked Hassan if she was all right and she said she was, Hill went back outside. Hill assumed Hassan was fine because a year and a half earlier, after an argument, Hill hit Hassan, Hassan fell down and "played dead and urinated on herself," and then "woke up after a period of time [and] was okay." When he returned this time, however, Hassan was unresponsive. Hill pleaded guilty to involuntary manslaughter as a result of the 2009 incident.

C. *The Jury Convicts Hill, and the Trial Court Sentences Him*

The jury found Hill guilty of inflicting corporal injury on Ebony, aggravated mayhem, and torture and acquitted him of attempted murder. The jury also found true the allegations he inflicted great bodily injury and used a deadly and dangerous weapon. The court dismissed the other charges (assault with a deadly weapon, assault by means of force likely to produce great bodily injury, and possession of a firearm by a felon) in furtherance of justice under section 1385.

The trial court sentenced Hill on his conviction for aggravated mayhem to a prison term of life with the possibility of parole, plus one year for the use of a deadly or dangerous weapon. Under section 654 the court stayed execution of the sentences imposed on Hill's other convictions.

DISCUSSION

A. *Substantial Evidence Supported Hill's Conviction for Aggravated Mayhem*

Hill contends substantial evidence did not support the jury's finding that, as required for aggravated mayhem, he specifically intended to maim Ebony. There was substantial evidence, however, to support that finding.

1. *Standard of Review*

"Where, as here, a defendant challenges the sufficiency of the evidence on appeal, we review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citations.] A reviewing court must reverse a conviction where the record provides no discernible support for the verdict even when viewed in the light most favorable to the judgment below. [Citation.] Nonetheless, it is the jury, not the reviewing court, that must weigh the evidence, resolve conflicting inferences, and determine whether the prosecution established guilt beyond a reasonable doubt. [Citation.] And if the circumstances reasonably justify the trier of fact's findings, the reviewing court's view that the circumstances might also reasonably be reconciled with a contrary finding does not warrant reversal of the

judgment." (*People v. Hubbard* (2016) 63 Cal.4th 378, 392; see *People v. Cravens* (2012) 53 Cal.4th 500, 508 ["[t]he conviction shall stand 'unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction]"'"].)

2. *There Was Substantial Evidence Hill Had the Specific Intent To Commit Aggravated Mayhem*

"In California, '[a] person is guilty of aggravated mayhem when he or she unlawfully, under circumstances manifesting extreme indifference to the physical or psychological well-being of another person, intentionally causes permanent disability or disfigurement of another human being or deprives a human being of a limb, organ, or member of his or her body.' . . . [T]his definition makes aggravated mayhem a specific intent crime, such that conviction requires proof beyond a reasonable doubt 'that the defendant acted with the specific intent to cause a maiming injury.'" (*People v. Manibusan* (2013) 58 Cal.4th 40, 86; see *People v. Szadziewicz* (2008) 161 Cal.App.4th 823, 831 ["[a]ggravated mayhem requires proof the defendant specifically intended to maim—to cause a permanent disability or disfigurement"], disapproved on another ground in *People v. Dalton* (2019) 7 Cal.5th 166.)

"'Evidence of a defendant's state of mind is almost inevitably circumstantial, but circumstantial evidence is as sufficient as direct evidence to support a conviction.'" (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1055.) "'A jury may infer a defendant's specific intent from the circumstances attending the act, the manner in which it is done, and the means used, among other factors.' [Citation.] '[E]vidence of a "controlled and directed" attack or an attack of "focused or limited scope" may provide substantial evidence of' a specific intent to maim."

(*People v. Szadziewicz*, *supra*, 161 Cal.App.4th at p. 831.) But "where the evidence shows no more than an 'indiscriminate' or 'random' attack, or an 'explosion of violence' upon the victim, it is insufficient to prove a specific intent to maim." (*People v. Quintero* (2006) 135 Cal.App.4th 1152, 1162.)

There was substantial evidence Hill specifically intended to cause Ebony permanent disability or disfigurement. Setting someone on fire will almost inevitably lead to burn marks, scars, and disfigurement. As it did here: Ebony suffered second degree burns, had burn wounds on her face, had to wear a bandage around the top of her head after the attack, and will have hypertrophic scars and discoloration. Indeed, it is difficult to conceive how setting someone on fire could evidence anything other than a specific intent to disfigure a victim who survives such an attack. (See *People v. Ferrell* (1990) 218 Cal.App.3d 828, 836 ["From [the] evidence, the jury could reasonably have inferred that [the defendant] intended both to kill [the victim], and, if she did not die, to disable her permanently."].) The attack was "controlled and directed" (*People v. Szadziewicz*, *supra*, 161 Cal.App.4th at p. 831), and not "indiscriminate" or "random" (*People v. Quintero*, *supra*, 135 Cal.App.4th at p. 1162) because, after his argument with Ebony, Hill took several steps to set her on fire. He found the rubbing alcohol, obtained a lighter, poured the alcohol on Ebony's head and upper body, threw a flame at her, and left without pausing to check on the consequences of his actions.

Hill argues his attack on Ebony was "indiscriminate" and an "explosion of violence" that lacked a specific intent to maim because Ebony suffered burns not only to her face, but also to her upper back, neck, and abdomen, which Hill asserts shows the attack was not "controlled and directed" or of "focused or limited scope." The attack, however, was directed at Ebony's head, even

though Hill also injured other parts of her body. When someone douses another person with flammable liquid, it may be difficult to control precisely where on the victim's body the liquid will land and what parts of the victim will burn. Hill's act of throwing rubbing alcohol at Ebony's head was controlled, directed, and focused enough, even though the alcohol Hill threw at Ebony also hit other parts of her body.

B. *Hill Forfeited His Argument the Trial Court Erred in Admitting Certain Details of His Prior Act of Domestic Violence, and Any Error Was Harmless*

Evidence Code section 1109, subdivision (a), provides that, "in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352." Thus, Evidence Code section 1109 "'permits the admission of defendant's other acts of domestic violence for the purpose of showing a propensity to commit such crimes,'" subject to the court's discretion to exclude the evidence under Evidence Code section 352. (*People v. Brown* (2011) 192 Cal.App.4th 1222, 1233; see *People v. Fruits* (2016) 247 Cal.App.4th 188, 202 ["Evidence Code section 1109 is an express exception to the prohibition against propensity evidence set forth in Evidence Code section 1101, subdivision (a)," and "allows a jury to draw propensity inferences from prior acts"].) The court has discretion under Evidence Code section 352 to exclude relevant evidence "'if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice.'" (*People v. Jackson* (2016) 1 Cal.5th 269, 330.) We review the trial court's ruling under Evidence Code sections 1109 and 352 for abuse of discretion. (*People v. Clark* (2016) 63

Cal.4th 522, 586; *Brown*, at p. 1233; *People v. Johnson* (2010) 185 Cal.App.4th 520, 531.)

Hill does not argue the trial court erred in admitting evidence of his 2009 incident of domestic violence against Hassan. He concedes "some aspects of the evidence of the 2009 incident may have had probative value indicating [Hill's] propensity to engage in domestic violence . . . ." He argues, however, the trial court abused its discretion in admitting certain "detail[s] of the incident." In particular, Hill argues the trial court should have excluded the facts that (1) Hassan died, (2) Hill changed his story when speaking to the police, and (3) Hill hit Hassan prior to the 2009 incident.

Hill, however, forfeited these arguments. Prior to trial, the trial court ruled the People could introduce evidence of Hill's 2009 incident of domestic violence against Hassan.
During trial, the prosecutor stated she had forgotten to discuss one aspect of the 2009 incident with the investigator from the sheriff's department whom the People called to testify about the incident. The prosecutor asked the court to admonish the investigator not to say the word "murder" or "killing." The court admonished the investigator, "All right. You were investigating a death, killing, but do not mention 'murder.'" Counsel for Hill stated, "It shouldn't be killing, either." The investigator in fact did not say the word "murder" or "killing" during his testimony about the 2009 incident, but he did mention that "the daughter of the deceased" was present at the scene and that he saw Hassan "at the coroner's office." Counsel for Hill did not object or move to strike either of these brief potential references ("the deceased" may have referred to someone else, and the investigator may have seen Hassan alive at the coroner's office) to the fact Hassan died. Therefore, Hill forfeited the argument that allowing the investigator to make these statements was error. (See *People v.*

Dykes (2009) 46 Cal.4th 731, 756 ["trial counsel's failure to object to claimed evidentiary error on the same ground asserted on appeal results in a forfeiture of the issue on appeal"]; *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 81-82 [failure to object or move to strike testimony forfeits the argument the testimony was inadmissible].)

Similarly, when the investigator described what Hill told him had happened with Hassan, the investigator stated Hill changed his version "several times." Again, there was no objection. And when the investigator stated Hill had explained he thought Hassan would be okay because she was unharmed when he previously hit her, counsel for Hill again did not object. In fact, the trial court had ruled before trial that evidence of the pre-2009 incident of domestic violence between Hill and Hassan would not be admissible in the People's case-in-chief and would only be admissible in rebuttal if Hill contended the attack on Ebony was accidental. Yet, Hill did not object or move to strike the (also brief) mention of the prior incident. Hill forfeited these arguments as well. (See *People v. Alexander* (2010) 49 Cal.4th 846, 912 [failure to object to the admission of evidence under Evid. Code, § 1101 forfeited the issue on appeal]; *People v. Bradley* (2012) 208 Cal.App.4th 64, 89 [same]; *People v. Crabtree* (2009) 169 Cal.App.4th 1293, 1314 [defendant forfeited the argument the trial court erred in admitting evidence under Evid. Code, § 1108 by "failing to make a timely objection"].)

Moreover, any error in admitting these details of Hill's prior act of domestic violence was harmless. "Error in admitting evidence of a defendant's prior acts of domestic violence under [Evidence Code] section[] 1109 . . . is subject to the standard of prejudice set forth in *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*)." (*People v. Megown* (2018) 28 Cal.App.5th 157, 167; see *People v. Ogle* (2010) 185 Cal.App.4th 1138, 1145.) Under

Watson, we will not reverse a judgment unless "defendant shows 'it is reasonably probable that a result more favorable to the [defendant] would have been reached in the absence of the error.'" (*Megown*, at p. 167.)

Here, even if the investigator had not used the words "deceased" and "coroner's office," or mentioned the pre-2009 incident and Hill's changing account of it, there is no reasonable probability Hill would have obtained a more favorable result. The evidence of Hill's guilt was compelling, undisputed, and overwhelming: He poured rubbing alcohol on his wife and lit her on fire. (See *People v. Lee* (2011) 51 Cal.4th 620, 646 [any error in admitting evidence the defendant's nickname was "Point Blank" was harmless "[g]iven the powerful evidence" of the defendant's guilt]; *People v. Curl* (2009) 46 Cal.4th 339, 362 [any error in admitting statement to establish consciousness of guilt "was harmless given the powerful evidence of defendant's guilt"]; *People v. Ogle*, *supra*, 185 Cal.App.4th at p. 1145 [error in admitting uncharged act of domestic violence was harmless because "[t]he other evidence against appellant was compelling"].) And Hill does not dispute that most of the testimony about the 2009 incident was admissible. He challenges only the investigator's utterance of a few stray words and phrases; their exclusion would not have made any difference. (See *People v. Penunuri* (2018) 5 Cal.5th 126, 166 ["erroneously admitted testimony was harmless beyond a reasonable doubt" where the witnesses' statements were "brief" and "a small part of the prosecution's case"]; *People v. Brown* (2003) 31 Cal.4th 518, 548, 551 [any error in admitting evidence the defendant's nickname was "Bam" or "Bam Bam," which connoted the firing of a weapon, was harmless where references to it were "brief, mild and factual"].) Therefore, any error was harmless under *Watson*.

C. *The Trial Court Did Not Commit Reversible Error in Failing To Instruct on Battery and Battery with Serious Bodily Injury as Lesser Included Offenses*

Hill contends that, because simple battery and battery with serious bodily injury are lesser included offenses of torture and aggravated mayhem, the trial court had a sua sponte duty to instruct the jury on those crimes. Simple battery and battery with serious bodily injury, however, are not lesser included offenses of torture, and battery with serious bodily injury is not a lesser included offense of aggravated mayhem. And although simple battery is a lesser included offense of aggravated mayhem, the trial court's failure to instruct on that offense was harmless.

1. *Applicable Law*

Battery is the willful and unlawful use of force or violence on the person of another. (§ 242.) Battery with serious bodily injury is battery that causes "a serious impairment of physical condition, including, but not limited to, the following: loss of consciousness; concussion; bone fracture; protracted loss or impairment of function of any bodily member or organ; a wound requiring extensive suturing; and serious disfigurement." (§ 243, subd. (f)(4).)

"'A trial court must instruct the jury sua sponte on a lesser included offense only if there is substantial evidence, "'that is, evidence that a reasonable jury could find persuasive"' [citation], which, if accepted, "'would absolve [the] defendant from guilt of the greater offense' [citation] *but not the lesser*."'" (*People v. Licas* (2007) 41 Cal.4th 362, 366 (*Licas*); see *People v. Cole* (2004) 33 Cal.4th 1158, 1218.) "'[A] lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the

greater cannot be committed without also committing the lesser.'" (*Licas*, at p. 366; see *People v. Hicks* (2017) 4 Cal.5th 203, 208-209.) "If a lesser offense shares some common elements with the greater offense, or if it arises out of the same criminal course of conduct as the greater offense, but it has one or more elements that are not elements of the greater offense as alleged, then it is a lesser related offense, not a necessarily included offense." (*Hicks*, at p. 209; see *People v. Hall* (2011) 200 Cal.App.4th 778, 781 ["'[a] defendant has no right to instructions on lesser related offenses'"].) "'We apply the independent or de novo standard of review to the failure by the trial court to instruct on an assertedly lesser included offense.'" (*Licas*, at p. 366; see *People v. Souza* (2012) 54 Cal.4th 90, 113.)

2. *Simple Battery and Battery with Serious Bodily Injury Are Not Lesser Included Offenses of Torture*

Section 206 defines torture as intending "to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose, inflict[ing] great bodily injury as defined in Section 12022.7 upon the person of another." Great bodily injury is a "significant or substantial physical injury." (§ 12022.7, subd. (f).) Hill concedes battery and battery with serious bodily injury are not lesser included offenses of torture under the elements test. And rightfully so: While battery offenses require a direct or indirect touching, a defendant can commit torture "where injury results from enforced deprivation, such as withholding food and water, causing starvation." (*People v. Lewis* (2004) 120 Cal.App.4th 882, 887.)

Hill does not argue battery and battery with serious bodily injury are lesser included offenses of torture under the accusatory pleadings test. And with good reason: The pleading here

precisely tracked the statutory language and did not include any language describing simple battery or battery with serious bodily injury. (See *People v. Robinson* (2016) 63 Cal.4th 200, 207 [where "the accusatory pleading incorporates the statutory definition of the charged offense without referring to the particular facts, a reviewing court must rely on the statutory elements to determine if there is a lesser included offense"]; *People v. Munoz* (2019) 31 Cal.App.5th 143, 156 [same].) The People alleged in the Information: "On or about December 24, 2016, in the County of Los Angeles, the crime of TORTURE, in violation of PENAL CODE SECTION 206, a Felony, was committed by DERRICK DWAYNE HILL, who did unlawfully and with the intent to cause cruel and extreme pain and suffering for the purpose of revenge, extortion, persuasion and for a sadistic purpose, inflict great bodily injury, as defined in Penal Code section 12022.7, upon EBONY HILL." This language is nearly identical to the statutory language and does not refer to any particular facts that Hill unlawfully used force against Ebony, as required for a battery.

Hill's only argument is that battery and battery with serious bodily injury are lesser included offenses under the "expanded accusatory pleading test" because that test would include consideration of evidence at the preliminary hearing. In *People v. Ortega* (2015) 240 Cal.App.4th 956 (*Ortega*), which Hill urges us to follow, the court applied an "expanded accusatory pleading test" and held "[t]he evidence adduced at the preliminary hearing must be considered in applying the accusatory pleading test when the specific conduct supporting a holding order establishes that the charged offense necessarily encompasses a lesser offense." (*Id.* at p. 967.)

The Court of Appeal's decision in *Ortega*, however, is inconsistent with the Supreme Court's decision in *People v.*

Montoya (2004) 33 Cal.4th 1031 (*Montoya*), which requires courts to "consider *only* the [accusatory] pleading" in determining whether a charged offense includes a lesser included offense under the accusatory pleading test. (*Id.* at p. 1036.) Indeed, the Supreme Court in *Montoya* disapproved *People v. Rush* (1993) 16 Cal.App.4th 20, which considered evidence at the preliminary hearing in applying the accusatory pleading test. (*Montoya*, at p. 1036, fn. 4; see *People v. Rush*, at p. 27.) Significantly, the Court of Appeal in *Ortega* did not discuss or distinguish *Montoya*. Courts since *Montoya* have continued to apply the rule excluding evidence at the preliminary hearing in applying the accusatory pleading test and have declined to follow *Ortega*. (See, e.g., *People v. Alvarez* (2019) 32 Cal.App.5th 781, 787-790; *People v. Munoz*, *supra*, 31 Cal.App.5th at pp. 157-158; *People v. Macias* (2018) 26 Cal.App.5th 957, 963-965.) As the court in *Munoz* explained: "The Supreme Court has indicated repeatedly . . . that when applying the accusatory pleading test to determine whether one offense is necessarily included in another, courts do not look to evidence beyond the actual pleading and its allegations regarding the purported greater offense." (*Munoz*, at p. 156; see *People v. Smith* (2013) 57 Cal.4th 232, 244 ["[t]he trial court need only examine the accusatory pleading"]; *People v. Chaney* (2005) 131 Cal.App.4th 253, 257 ["'to determine whether a defendant is entitled to instruction on a lesser uncharged offense—we consider *only* the pleading for the greater offense'"].)

We follow the Supreme Court's decision in *Montoya* and join the growing list of post-*Montoya* cases that have refused to apply the expanded accusatory pleading test. Therefore, the trial court did not have a sua sponte duty to instruct on simple battery and battery with serious bodily injury as lesser included offenses of torture.

3. *Battery with Serious Bodily Injury Is Not a Lesser Included Offense of Aggravated Mayhem*

Under section 203, "[e]very person who unlawfully and maliciously deprives a human being of a member of his body, or disables, disfigures, or renders it useless, or cuts or disables the tongue, or puts out an eye, or slits the nose, ear, or lip, is guilty of mayhem." Although great bodily injury is an element of mayhem (*People v. Brown* (2001) 91 Cal.App.4th 256, 272; *People v. Hill* (1994) 23 Cal.App.4th 1566, 1575; *People v. Keenan* (1991) 227 Cal.App.3d 26, 36, fn. 7; *People v. Pitts* (1990) 223 Cal.App.3d 1547, 1559), serious bodily injury is not. (*People v. Santana* (2013) 56 Cal.4th 999, 1007; *People v. Turner* (2019) ___ Cal.App.5th ___, ___ [2019 WL 3296951, at p. 4].) And although courts have described the terms "serious bodily injury" and "great bodily injury" as equivalent in certain contexts, "the terms in fact 'have separate and distinct statutory definitions.' [Citation.] This distinction may make a difference when evaluating jury instructions that provide different definitions for the two terms." (*Santana*, at pp. 1008-1009; see *People v. Poisson* (2016) 246 Cal.App.4th 121, 125 [citing *Santana* and rejecting the proposition that the terms great bodily injury and serious bodily injury should be used "interchangeably"]; cf. *People v. Johnson* (2016) 244 Cal.App.4th 384, 391 ["'serious bodily injury,' as used in section 243, and 'great bodily injury,' as used in section 12022.7, are essentially equivalent" *outside* the context of jury instructions].) Therefore, for purposes of whether the court has a sua sponte duty to instruct on a lesser included offense, battery with serious bodily injury is not a lesser included offense of simple mayhem.

Nor is it a lesser included offense of aggravated mayhem. The only differences between simple mayhem and aggravated

mayhem are "the required intent and the potential sentence." (*People v. Park* (2003) 112 Cal.App.4th 61, 64; see *People v. Assad* (2010) 189 Cal.App.4th 187, 195.) Aggravated mayhem does not require an injury greater than the injury required for simple mayhem. (See *People v. Newby* (2008) 167 Cal.App.4th 1341, 1347 ["We have found no case law suggesting that, in addition to the specific intent required for aggravated mayhem, the disfiguring injury must also be more permanent than the permanent injury required for simple mayhem"].) Thus, battery with serious bodily injury is not a lesser included offense of aggravated mayhem, and the trial court did not have a sua sponte duty to instruct on battery with serious bodily injury.

4. *Simple Battery Is a Lesser Included Offense of Aggravated Mayhem, but Any Error in Failing To Instruct on Simple Battery Was Harmless*

Hill argues that simple battery is a lesser included offense of aggravated mayhem and that substantial evidence supported a simple battery instruction. The People do not dispute simple battery is a lesser included offense of aggravated mayhem under the elements test. The statutory elements of aggravated mayhem include the elements of battery, such that a defendant cannot commit aggravated mayhem without also committing a battery. (See *Licas*, *supra*, 41 Cal.4th at p. 366.) Any error in the trial court's failure to instruct on simple battery, however, was harmless.

"'"To justify a lesser included offense instruction, the evidence supporting the instruction must be substantial—that is, it must be evidence from which a jury composed of reasonable persons could conclude that the facts underlying the particular instruction exist." (*People v. Enraca* (2012) 53 Cal.4th 735, 759.) "This substantial evidence requirement is not satisfied by "'*any*

evidence . . . no matter how weak,'" but rather by evidence from which a jury composed of reasonable persons could conclude 'that the lesser offense, but not the greater, was committed.'" (*People v. Avila* (2009) 46 Cal.4th 680, 705.)

"In noncapital cases, 'the rule requiring sua sponte instructions on all lesser necessarily included offenses supported by the evidence derives exclusively from California law.' [Citation.] As such, 'in a noncapital case, error in failing sua sponte to instruct, or to instruct fully, on all lesser included offenses and theories thereof which are supported by the evidence must be reviewed for prejudice exclusively under *Watson* . . . .'" (*People v. Beltran* (2013) 56 Cal.4th 935, 955; see *People v. Hicks*, *supra*, 4 Cal.5th at p. 215 ["In a noncapital case, the trial court's failure to instruct on *necessarily included* offenses is reviewed for prejudice under the *Watson* standard."]; *People v. Rogers* (2006) 39 Cal.4th 826, 867-868 ["[t]he erroneous failure to instruct on a lesser included offense generally is subject to harmless error review under the standard of *People v. Watson*"].) "'[U]nder *Watson*, a defendant must show it is reasonably probable a more favorable result would have been obtained absent the error.'" (*Beltran*, at p. 955; accord, *People v. Thomas* (2012) 53 Cal.4th 771, 814; see *People v. Prince* (2007) 40 Cal.4th 1179, 1267 ["'[r]eversal is required only if it is reasonably probable the jury would have returned a different verdict absent the error or errors complained of'"].) Thus, even if substantial evidence supported an instruction on a lesser included offense, the relative weight of the evidence may compel the conclusion there is no reasonable probability the failure to instruct affected the result. (*Beltran*, at p. 956; *People v. Breverman* (1998) 19 Cal.4th 142, 177-178; see *People v. Banks* (2014) 59 Cal.4th 1113, 1161 ["evidence sufficient to warrant an instruction on a lesser included offense does not necessarily amount to evidence sufficient to create a reasonable

probability of a different outcome had the instruction been given"], disapproved on another ground in *People v. Scott* (2015) 61 Cal.4th 363, 391, fn. 3.)

Here, to convict Hill of simple battery but not aggravated mayhem, the jury would have to find that Hill willfully and unlawfully used force or violence against Ebony, but not "under circumstances manifesting extreme indifference" to her "physical or psychological well-being," and that Hill did not intend to cause Ebony "permanent disability or disfigurement" or deprive her "of a limb, organ, or member of . . . her body." (§§ 205, 242.) There is no reasonable probability of that. Hill poured alcohol on Ebony and set her on fire, leaving her with second degree burns. Hill did not merely use force or violence, he attacked with flammable liquid and fire with the intent to permanently disfigure. No reasonable jury could have found Hill was guilty of battery and not aggravated mayhem. Therefore, any error in failing to instruct on simple battery was harmless.

DISPOSITION

The judgment is affirmed.

SEGAL, J.

We concur:

PERLUSS, P. J. STONE, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.